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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/375,120	08/16/1999	DANIEL B. REENTS	2000.012600	4618

23720 7590 04/25/2005

WILLIAMS, MORGAN & AMERSON, P.C.
10333 RICHMOND, SUITE 1100
HOUSTON, TX 77042

EXAMINER

CHASE, SHELLY A

ART UNIT	PAPER NUMBER
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2133

DATE MAILED: 04/25/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/375,120

Applicant(s)

REENTS ET AL.

Examiner

Shelly A. Chase

Art Unit

2133

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 04 April 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

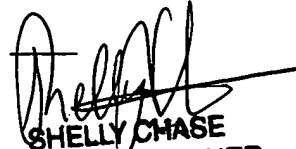
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: 8-36.
Claim(s) rejected: 1-7 & 37-41.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached remarks.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s).
13. ☐ Other: _____.


SHELLY CHASE
PRIMARY EXAMINER

Response to Arguments

REMARKS

1. Applicant's arguments filed 4-4-2005 have been fully considered but they are not persuasive.

2. In response to the arguments concerning the previously rejected claims the following comments are made:

The first section of the claims is directed to an adaptive frame tracking device capable of sending and receiving at least one data packet... The examiner rejected this portion of the claim using Gulick (USP 5958027) who teaches a USB host ("frame tracking unit") that receives data from a data producer, sends data to a USB function and monitors the level of the buffer for overflow thereby issuing a lead/lag signal to increase or decrease the clock rate (see col. 7, lines 5 to 50). Gulick also teaches that to prevent buffer overflow it is necessary to match the output data rate of the producer to the USB host output rate (see col. 5, lines 10 to 19). Gulick further teaches that the buffer level is monitored as input data is received (see col. 8, lines 54 to 60).

The second section of the claim is directed to automatically adjusting a data rate of said data packet by determining if there exists at least one data frame error and correcting for said data frame error in response to a determination that there exists at least one said data frame error. The examiner indicated that Gulick adjusted the clock

rate if buffer level indicates an overflow ("frame error") and failed to specifically teach that the adjusting of the clock rate is automatic. The examiner applied Martin (USP 6021129) who teaches a modem communicating information from a communication link to a host using a universal serial bus (USB) wherein the modem includes a rate control device for adjusting the transmission rate when a transmission error is detected for asynchronous transfer mode (ATM) cells that are transferred (see col. 4, lines 5 to 21).

Martin further teaches that the modem operates in a continuous mode (see col. 20, line 61 to col. 21, line 7) and if a transmission error is detected, the transmission error is used to adjust the transmission rate to compensate for delays (see fig. 6a-6d and col. 25, lines 48 to 59). Martin teaches that if a transmission error is less than or greater than the transmission rate changing the rate to compensate for delays is necessary (see col. 26, lines 11 et seq.). Therefore the combination of Gulick in view of Martin broadly teaches the claimed invention.

The examiner agrees with applicant's representative that Gulick does not explicitly teach automatically adjusting a data rate of a data packet based upon a data frame error; however, the examiner would like to point out that Gulick teaches adjusting the clock rate if the flow of data is not correct and the specification on page 4, par. 2 indicates that errors can occur when data is transferred and received or problems with synchronous flow. Therefore, the examiner maintains that the adjustment as taught by Gulick will effect adjustment for transmission errors.

The examiner disagrees with applicant's representative that Martin fails to teach automatically adjusting a data rate based upon a data frame error because, Martin

teaches the modem operates in continuous manner and includes a rate control device for adjusting the transmission rate if a transmission error is detected. Therefore, the examiner maintains that the combination of Gulick in view of Martin broadly encompasses the scope of the claimed invention. I.e., Gulick in view of Martin ensures proper flow of transmitted data by monitoring data levels.

The examiner disagrees with applicant's representative that the examiner erroneously used improper hindsight reasoning to pick and choose various portions of Martin and Gulick in attempt to make obvious all the elements of claim 1 because, MPEP sect 2123 states "*The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain.*" *In re Heck*, 699 F.2d 1331, 1332-33, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Therefore, the examiner maintains that the combining of various pieces of Martin and Gulick reference is not based on improper hindsight reasoning since the

teachings of Gulick in view of Martin monitors data levels for data transmitted via of USB system and makes adjustments if a transmission error is detected.

In response to the argument that Gulick nor Martin by themselves could not possibly disclose, suggest, or make obvious, all the elements of claim 1 of the present invention, the examiner disagrees with applicant's representative because, the claim is rejected by a combination of Gulick in view of Martin and the claimed invention as a whole was examined and found obvious over the prior art made of record. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

As to the argument that Martin does not teach frame tracking much less adaptive frame tracking, the examiner agrees that Martin does not specifically teach frame tracking; however, the teachings of Martin broadly encompasses the invention of monitoring transmitted data for errors and adjusting a rate once an error is detected.

The examiner notes that the prior art nevertheless does teach a device for monitoring transmitted data for flow control wherein the device is capable of receiving data and sending data as taught by Gulick and a rate control unit that is part of a control device adjusting transmission rate if a transmission error is detected as taught by Martin, which reads on "automatically adjusting a data rate of said data packet by determining if there exists at least one data frame error and correcting for said data frame error in response to a determination that there exists at least one said data frame

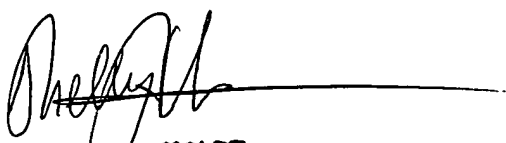
error. The combination of Gulick in view of Martin broadly encompasses a device for sending and receiving data and automatically adjusting a rate if an error is detected for transmitted data over a USB device. Therefore, the examiner maintains that the combination of Gulick in view of Martin teaches the invention in a broad sense and the examiner examined the claim based on the broadest reasonable interpretation.

Conclusion

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shelly A. Chase whose telephone number is 571-272-3816. The examiner can normally be reached on Mon-Thur from 8:00 am to 6:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Albert Decady can be reached on 703-305-9595. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


SHELLY CHASE
PRIMARY EXAMINER